ORIGINAL

FILED
APR 23 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-6211

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WESLEY ERIC HARRIS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

QUESTION PRESENTED

WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS FROM JURY PANELS THROUGH THE EXERCISE OF PEREMPTORY CHALLENGES?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	i
OPINION BELOW	1
JURISDICTION.	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts.	2
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT.	5
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION. . . .	5
II. THIS COURT PREVIOUSLY DENIED CERTIORARI ON THE SAME QUESTION.	5
III. REVIEW OF PETITIONER'S CLAIM OF INTENTIONAL AND SYSTEMATIC EXCLUSION OF BLACKS SHOULD BE DENIED AS ONLY QUSTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED	6
CONCLUSION.	7

INDEX OF AUTHORITIES

Cases	Page
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) . . .	7
McCray v. New York, 51 U.S.L.W. 3855 (May 31, 1963)	5,6
Swain v. Alabama, 380 U.S. 202 (1965)	5,6
Tacon v. Arizona, 410 U.S. 351 (1973)	7

Statutes	
28 U.S.C. §1257(3).	1

NO. 83-6211

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WESLEY ERIC HARRIS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is unpublished, is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing on December 7, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 182nd Judicial District Court of Harris County, Texas, in Cause No. 297546 styled The State of Texas v. Wesley Eric Harris. Petitioner was charged with the offense of sexual abuse, to which he entered a plea of not guilty. Petitioner was tried by a jury, which on October 29, 1979, found him guilty of the offense charged. The court assessed punishment at imprisonment for twelve (12) years in the Texas Department of Corrections.

Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals en banc on October 19, 1983. Harris v. State, No. 68,170 (Tex.Crim.App., Oct. 19, 1983) (en banc). Petitioner's Motion for Leave to File Motion for Rehearing was denied without written order on December 8, 1983.

B. Statement of Facts

The record reflects that subsequent to the selection of the jurors, Petitioner filed a "Motion to Dismiss Indictment Based on State's Systematic Exclusion of Black Persons from Jury Panel" (Tr. 34, 38). A hearing was held in the trial court (SF 1045-1200) and Petitioner's motion was denied by the trial court.

In addition to the testimony mentioned by Petitioner in his statement of facts in the Petition for Writ of Certiorari, the record reflects the following testimony was adduced at the hearing on the Motion to Dismiss the Indictment. Judge Miron Love, Judge of the 177th District Court of Harris County, testified that in his extensive tenure on the bench he had observed black persons serving on juries in which the defendants were black and the victims white (SF 1045-48). Ken Sparks, an assistant district attorney in Harris County, Texas, testified

that he had accepted black persons on juries on many different occasions (SF 1085). He further testified that the Harris County District Attorney's Office had no policy, pattern or practice of excluding blacks from juries in "sex related" cases where the victim was white and the defendant black (SF 1064-1066). Andy Tobias, another assistant district attorney in Harris County, testified that as a person in a supervisory position within the district attorney's Office he had never advised prosecutors to strike all black persons from jury panels and, further, he testified that he had personally accepted black persons as jurors in cases where the victim was white and the defendant black (SF 1090-1106). Bob Burdette, an assistant district attorney in Harris County, testified that he had participated in trials in which there were black defendants and white victims (SF 1108-09). He stated that he had kept blacks on the jury in such cases, even though he had peremptory challenges available (SF 1109). Ted Busch, Chief of the Trial Bureau in the Harris County District Attorney's Office, testified that he had accepted black persons on the jury in sex related cases where the victim was white and the defendant black on many occasions (SF 1111-1112) and, that on many of those occasions, he had the opportunity to use a peremptory strike but elected not to do so (SF 1114-15). He further testified that he was not aware of any policy, system, pattern or practice in the Harris County District Attorney's Office to utilize peremptory challenges to exclude blacks from juries and that if such existed, he would know about it (SF 1112-13). Veronica Morgan, another assistant district attorney and a witness called by Petitioner, testified that very often in those types of cases blacks were peremptorily excused by the State, but that she had not observed any systematic exclusion of blacks from the jury panel in such cases (SF 1121). Judge Thomas Routt, Judge of the 208th District Court, and a black person himself, testified that in his experience as a judge a

majority of the jury trials over which he had presided had included at least one black person on the jury (SF 1130-31). He estimated that in only five to ten percent of the cases over which he had presided had no black person served on the jury (SF 1130-1133). In contrast, most of the witnesses called by Petitioner to testify that in their experience prosecutors in Harris County, Texas, had generally used peremptory challenges to eliminate black persons from the jury panel in sex related cases involving a black defendant and a white victim were shown to have had exposure to a limited number of trials. Wesley Hocker, a criminal defense attorney, testified that he had tried approximately one hundred cases and only fifteen percent of those cases fit that category (SF 1050-1054). He admitted that he could not testify to a systematic exclusion of jurors in those types of cases in Harris County, but could only testify that in the few cases he had tried that fit that category such exclusion had occurred (SF 1055-1056). Judge Joseph Guarino, Judge of the 183rd District Court, testified to only having observed eight to ten such cases (SF 1073). Jacquelyn Miles, a court reporter, testified to having observed only ten to twelve such cases (SF 1135-1141).

The Texas Court of Criminal Appeals, after careful review of the evidence presented, found that Petitioner had failed to establish systematic exclusion of blacks from jury panels. The court further found that the trial court was entitled, as a matter of state law, to resolve conflicting evidence against Petitioner. Harris v. State, at 6-7.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well settled constitutional principles to the facts involved herein.

Petitioner's claims of intentional and systematic exclusion of blacks from jury service by the prosecutor's use of peremptory challenges should be denied as only questions of evidence and

factual findings are involved. The court below, applying the guidelines of Swain v. Alabama, 380 U.S. 202 (1965) and carefully reviewing the testimony adduced at the hearing on Petitioner's "Motion to Dismiss the Indictment based on State's Systematic Exclusion of Black Persons from Jury Panels", found that Petitioner failed to demonstrate systematic exclusion of Blacks from jury panels through the state's operation of its peremptory system.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner had advanced no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II. THIS COURT PREVIOUSLY DENIED CERTIORARI ON THE SAME QUESTION.

In McCray v. New York, 51 U.S.L.W. 3855 (May 31, 1983), this Court denied a writ of certiorari when the petitioner sought review of the question of whether the state's use of peremptory challenges to exclude potential black jurors because of their race violates criminal defendants' right to an impartial jury drawn from a fair cross-section of the community. In the opinions respecting the denial of the petitions for writ of certiorari, Justices Stevens, Blackmun and Powell wrote:

> I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the

> prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury.... That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which has traditionally been final and unreviewable.... In my judgment it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this court.

Id. (citations omitted)

Petitioner has neither alleged nor demonstrated any conflict within the circuits which has arised since the court's denial of certiorari in McCray. Nor does Petitioner allege any recent action occurring in the state courts. Thus, there have been no significant intervening developments that render the issue presented more worthy of this Court's attention.

III. REVIEW OF PETITIONER'S CLAIM OF INTENTIONAL AND SYSTEMATIC EXCLUSION OF BLACKS SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The question presented for review relative to Petitioner's claim that blacks were intentionally and systematically excluded from serving on juries because of the prosecutor's pattern and practice of excluding black jurors through the exercise of peremptory challenges does not present a substantial question worthy of this Court's review. Contrary to Petitioner's allegations, the question presented is, in actuality, one of sufficiency of the evidence to prove systematic exclusion of blacks from jury panels. The state trial and appellate courts decided this question adversely to Petitioner.

In Swain v. Alabama, 380 U.S. 202 (1965), the court held that in reviewing the prosecutor's exercise of his peremptory challenges:

> "[T]he presumption in any particular case must be that the prosecutor is using the state's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subject to examination by allegations that in the case at hand all [blacks] were removed from the

> jury or that they were removed because they were [blacks].

380 U.S. at 222. The court noted, however, that such presumption may be overcome by evidence of the government's deliberate and systematic exclusion of blacks from the jury through the state's exercise of its peremptory challenges. 380 U.S. at 225. The burden is on the petitioner to demonstrate by sufficient evidence systematic discrimination of constitutionally significant proportions. 380 U.S. at 225-26.

Applying the Swain guidelines and carefully examining the testimony adduced at the hearing on Petitioner's motion, the Texas Court of Criminal Appeals, en banc, held that Petitioner failed to present sufficient evidence to establish the systematic exclusion of blacks from jury panels through the State's exercise of its peremptory challenges. Harris v. State, at 6-7. The issue presented thus involves nothing more than evidentiary questions and factual determinations made by the state trial and appellate courts. Such questions do not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT-APPELLEE

RECEIVED
APR 2 3 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-6211

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WESLEY ERIC HARRIS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 20th day of April, 1984, one copy of the Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Michael A. Maness, 2000 North Loop West, Suite 123, Houston, Texas 77018. All parties required to be served have been served. I am a member of the Bar of this Court.

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of April, 1984.

Frank K. Wilhelm

NOTARY PUBLIC in and for
Travis County, T E X A S